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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1074

AMERICAN HOME ASSURANCE COMPANY,
Petitioner

v.

HELEN N. SPICER, JUDY MINNIS and BEVERLY MINNIS,
Respondents

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

---

Petitioner prays that a writ or writs of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit made and entered in the above cause on November 13, 1968.

## OPINIONS BELOW

The opinion rendered by the United States District Court for the Northern District of Georgia (R. 263-278) is reported at 292 F. Supp. 27 (N.D. Ga. 1968). The opinion rendered by the United States Court of Appeals for the Fifth Circuit (R. 340-341) is reported at 402 F.2d 988 (5th Cir. 1968).

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on November 13, 1968 (R. 340-341), and a copy thereof is appended to this petition in the Appendix at pp. 17-18. The Circuit Court entered a judgment denying Appellant's Petition for Rehearing on December 17, 1968 (R. 352), and a copy thereof is appended to this petition in the Appendix at p. 18. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

## QUESTIONS PRESENTED

Petitioner issued an indemnity policy in lieu of a bond pursuant to Georgia Code Annotated § 68-612 to a motor common carrier. Respondents sued a driver of said motor common carrier individually for personal injuries allegedly received in an automobile collision which took place in Georgia, in three separate actions. Said driver, being a resident of Kentucky, was served under Georgia's non-resident motorist statute. The driver failed to notify petitioner of said suit, did not turn the papers over to Petitioner, and otherwise failed to comply with the policy conditions. Respondents took default judgments against the driver, in the sums of Fifteen Thousand Dollars ($15,000.00), Four Thousand Dollars ($4,000.00), and Three Thousand Dollars ($3,000.00) respectively. The latter two respondents requested new trials, notice of which was not given to the driver or to Petitioner as required by Georgia Law. The Four Thousand Dollar ($4,000.00) and Three Thousand Dollar ($3,000.00) verdicts were later converted into judgments of Twelve Thousand Five Hundred Dollars ($12,500.00) and Seven Thousand Five Hundred Dollars ($7,500.00). Respondents brought three (3) suits in the District Court for the Northern District of Georgia against Petitioner for collection of the State Court judgments. The District Court granted respondents' motions for summary judgments under a theory of absolute liability holding that Petitioner could not assert policy defenses against the

driver as a defense to the Respondent's actions. For the first time on appeal, Petitioner moved to dismiss one (1) of the cases for lack of subject-matter jurisdiction due to a failure to meet the jurisdictional amount requirement in 28 U.S.C.A. § 1332, and further asserting a collateral attack on two (2) of the State Court judgments sued upon, contending that they were void under Georgia Code Annotated § 70-306 as construed by Georgia Case Law. The Court of Appeals affirmed the District Court's opinion and failed to rule on Petitioner's motions to dismiss for lack of subject-matter jurisdiction properly raised for the first time on appeal. The questions presented are:

1. Whether Petitioner is absolutely liable for the State Court default judgments entered against the non-resident driver of the insured irrespective of any policy defenses the insurer may have against the driver or the alleged insured when Petitioner was not sued pursuant to the provisions of Georgia Code Annotated § 68-612, the statute which created the direct action and specifically provides for the proper procedure for instigating suit in the first instance.

2. Whether the amount in controversy in the case of *Beverly Minnis v. American Home Insurance Company*, Civil Action No. 10122 is in excess of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

3. Whether the cases of *Beverly Minnis v. American Home Insurance Company*, Civil Action No. 10122, and *Judy Minnis v. American Home Insurance Company*, Civil Action No. 10121 were suits for the collection of void State Court judgments and thus subject to collateral attack for lacking subject-matter jurisdiction.

## STATUTES AND RULES INVOLVED

The statutory provisions which are relevant to decision of this case and which are set forth in full in the Appendix at pp. 14-16, are 28 U.S.C.A. § 1332, Rule 12(h)(3) of the Federal Rules of Civil Procedure, Georgia Code Annotated § 68-612, and Georgia Code Annotated § 70-306.

## STATEMENT

These three (3) cases were originally filed in the Georgia State Courts against Walter Frederick Lucas, a non-resident defendant living in Kentucky. (R. 33-43, 128-143, 152-167). Service of process upon Lucas in each separate case was obtained pursuant to Georgia's non-resident motorist statute. (R. 33, 128, 152-153). Lucas did not turn the suits over to Petitioner (R. 74) Lucas did not request Petitioner to enter a defense in his behalf. (R. 74). Lucas failed to cooperate with Petitioner in all respects. (R. 74-75). All three (3) State Court suits, therefore, went into default. Plaintiffs took default judgments against Lucas and, as required by Georgia Law, presented evidence ex parte to a jury as to damages. The jury awarded the plaintiff, Beverly Minnis, Four Thousand Dollars ($4,000.00) (R. 164), the plaintiff, Judy Minnis, Three Thousand Dollars ($3,000.00) (R. 140), and the plaintiff, Helen N. Spicer, Fifteen Thousand Dollars ($15,000.00) (R. 18). Without notice to Lucas, or to Petitioner herein, Beverly Minnis and Judy Minnis requested and were granted new trials (R. 164-165, 141). Still later, unknown to Lucas or Petitioner until after the fact, another jury awarded Beverly Minnis Seven Thousand Five Hundred Dollars ($7,500.00) (R. 165) and Judy Minnis Twelve Thousand Five Hundred Dollars ($12,500.00) (R. 141) and judgments were entered thereon.

Each plaintiff mentioned above filed a separate suit against Petitioner herein, American Home Assurance Company, in the United States District Court for the Northern District of Georgia, for collection of the abovementioned State Court judgments, and seeking recovery for bad faith attorney fees. (R. 1-19, 84-89, 90-95). Jurisdiction was based on diversity of citizenship. In the case involving the largest judgment, Fifteen Thousand Dollars ($15,000.00), plaintiff sought Two Thousand Five Hundred Dollars ($2,500.00) in attorney fees (R. 1). In the case involving the smallest judgment, Seven Thousand Five Hundred Dollars ($7,500.00), the plaintiff therein sought Three Thousand Dollars ($3,000.00) in attorney fees. (R. 90)

These District Court suits alleged for the first time that Lucas was an agent, at the time of the accident, of Petitioner's insured, Martin Stewart House Sales Company, and therefore insured by Petitioner under an insurance contract covering a public common carrier issued pursuant to Georgia Code Annotated § 68-612.

Petitioner answered said suits by alleging, among other things, the lack of cooperation of Lucas, the alleged insured (R. 74-75).

Petitioner maintained that the plaintiffs, by not complying with the Georgia requirements for bringing a direct action in the first instance against the insurer as authorized by Georgia Code Annotated § 68-612 where a public common carrier policy exists, but electing instead to sue the non-resident individual under the non-resident motorist statute, alone, a method *not* authorized by § 68-612, plaintiffs had elected an alternative remedy which did not create absolute liability upon the insurer for default judgments, left Petitioner with the right to assert policy defenses against the insured as a valid defense to these Federal diversity actions, and entitled Petitioner to its "day-in-court" with an equal opportunity to defend on those grounds. (R. 247-254, 280-321).

Plaintiffs filed a motion for summary judgment in each of the three (3) cases (R. 237). The District Court, without consolidating the cases, entered one (1) opinion applicable to all three (3) cases, and granted plaintiffs' motions for summary judgment, holding Petitioner absolutely liable for the State Court judgments. (R. 263-278).

From this opinion the Petitioner appealed to the Fifth Circuit Court of Appeals (R. 331-332). A Supersedeas was required by the plaintiff in each case (R. 333-334), and Petitioner was required to post a bond in each case for the full amount of each judgment. (R. 336-337). For purposes of appeal, all three (3) cases were carried under one (1) docket number.

For the first time on appeal, in addition to maintaining that the District Court's opinion was erroneous, Petitioner asserted that two (2) of the cases should be dismissed for lack of subject-matter jurisdiction. (Supp. R. 25-31, Appellant's Brief, pages 25-31).

Petitioner alleged that in the case of Beverly Minnis, it being a suit for collection of a judgment in the sum of Seven Thousand Five Hundred Dollars ($7,500.00), the amount in controversy was not in excess of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs. (Supp. R. 25-28, Appellant's Brief pages 25-28). Petitioner further maintained that in the cases of Beverly Minnis and Judy Minnis, both lacked subject-matter jurisdiction in the District Court since Georgia Law requires notice of a request for a new trial to be served upon the defendant and the Respondents failed to comply with this requirement. Since no such notice was given, Georgia Law is clear that the subsequent judgments were void. Petitioner further argued that suits for collection of void State Court judgments were likewise void, lacking in jurisdiction, and now asserts that the previous awards of Four Thousand Dollars ($4,000.00) and Three Thousand Dollars ($3,000.00) were, therefore, well below the Federal subject-matter jurisdictional requirements. (Supp. R. 28-31 Appellant's Brief pp. 28-31).

The Court of Appeals, in a three-sentence Per Curiam opinion, affirmed the District Court's opinion and adopted the District Court's opinion as its own. (R. 340-341).

In its Petition for Rehearing En Banc, Petitioner called the Court's attention to the fact that by adopting the District Court's opinion as its own, the Court of Appeals failed to reach a decision on Petitioner's motion to dismiss for lack of subject-matter jurisdiction in two (2) of the three (3) cases which had been raised for the first time on appeal and never considered by the District Court (R. 343-351). The Petition for Rehearing was cursorily denied (R. 352).

Petitioner then filed a motion with the Court of Appeals seeking a stay of the mandate pending the outcome of an

attack upon the void State Court judgments currently pending in the Georgia State Courts. (Supp. R. 80-83). Said motion was overruled. (Supp. R. 104). Petitioner now respectfully seeks review of the decision of the Court of Appeals in its entirety, and a ruling for the first time upon its motion to dismiss two (2) of the three (3) cases for lack of subject-matter jurisdiction.

## REASONS FOR GRANTING THE WRIT

### A. THE DECISION BELOW

1. This is a question of first impression which has neither been decided by any other jurisdiction nor by this Court. As the District Court noted:

> "The problem presented by these motions presents a troublesome and vexing question. Basically, the plaintiffs contend that they are entitled to recover against the insurance company by virtue of the provisions of the 'indemnity' statute, i.e. Code § 68-612. Conversely, the defendant contends that the State suits were not filed under that section, that there were no allegations of agency against the motor carrier, but that they were straight damage suits against Lucas in which service was perfected under an entirely different provision of law. Consequently, it insists that its liability, if any, is under the insurance policy only and not under the provisions of § 68-612. There being a breach of that policy, it further insists that there is no liability at all. If the plaintiffs' motions fail, then, of course, the defendant is entitled, at least, to a jury trial on the issue of breach of its policy by Lucas, as an additional insured thereunder.
>
> "No case is presented which answers the question directly, and a careful search of available material from other jurisdictions likewise fails to uncover specific authority." (R. 267-268)

2. The opinion of the District Court, which was adopted by the Court of Appeals, is a matter of grave importance to the insurance industry and the public at large. The decision

will substantially affect an insurer's risk upon an indemnity policy issued in lieu of a bond required by almost every state in the United States of all motor carriers as a condition precedent to the issuance of a certificate of public convenience. The possible increase of premiums, the reluctance to issue said policies, and the resulting distribution of the added pecuniary exposure should insurers be held absolutely liable for default judgments rendered against an uncooperative non-resident agent of an insured, as was done in these cases, needs no further amplification or explanation to this court. Its seriousness is patently obvious.

3. In the case of *Lumberman's Mutual Casualty Company v. Elbert,* 348 U.S. 48 (1954), this Court was presented with this same question in a case involving the Louisiana direct action statute and the decision was based upon a construction of the applicable Louisiana Law. Although the Louisiana Statute was not restricted to cases involving motor common carriers, it was based and passed upon the same public policy considerations herein involved. This Court noted that the Louisiana Courts, located in the Fifth Circuit, had held that policy defenses were available to the insurer in a suit for collection of a judgment obtained against the insured, but not available if the insurer were sued directly pursuant to the direct action statute. This Court stated:

> "But the Louisiana Courts have differentiated between actions brought by an injured party against the insurer alone and those brought against either the tortfeasor alone or together with the insurer. In the former action, the insurer is foreclosed from asserting defenses such as coverture, normally available to the tortfeasor . . . . Similarly, the insurer is severely restricted in advancing technical defenses based upon the terms of the policy, such as a failure of notice, when the injured party brings a direct action. *Jackson v. State Farm Mutual Automobile Ins. Co.,* 211 La. 19, 29 Do. 2d 177 . . . . The Louisiana Courts have characterized the statute as creating a

> separate and distinct cause of action against the insurer which an injured party may elect *in lieu* of his action against the tortfeasor. *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d 122; *Jackson v. State Farm Mutual Automobile Ins. Co.*, Supra." 348 U.S. at p. 51.

Although the Georgia Courts have not decided this matter, Petitioner maintains it will most likely be decided as it was in Louisiana. The intent of the two (2) legislatures was identical. One of the basic purposes for creating a direct action is to avoid a multiplicity of suits by allowing the injured party to obtain a complete adjudication against the untimately responsible party in the initial suit and therefore doing away with any subsequent litigation. The election by the plaintiffs herein not to bring petitioner in as a party to the initial suits in the State Court as authorized by Georgia Code Annotated § 68-612 fully frustrates this purpose. Therefore, allowing plaintiffs, after electing not to invoke the provisions of Georgia Code Annotated § 68-612, to bring a direct action to assert absolute liability in a subsequent suit for collection of said default judgments exposes the insurer to liability for a judgment it was denied the opportunity to adequately defend as to either liability, and/or damages. Petitioner maintains this is tantamount to a deprivation of property without due process of law. For these reasons, Petitioner maintains that the Court of Appeals has decided this important State question in a way that it conflicts with applicable, although yet undetermined, state law, in a way that it conflicts with a decision construing a similar state statute within the Fifth Circuit and affirmed by this Court, and in a way in which it is most likely to conflict with future decisions of Court of Appeals in other circuits since it presents a serious question of due process.

4. Respondents obtained default judgments against the tortfeasor. In the present actions, they seek to collect under the tortfeasor's employer's insurance policy. Petitioner maintains that as judgment-creditors, Respondents

stand in the position of the debtor-defendant-tortfeasor with respect to the insurance policy. The decision below, therefore, conflicts with Circuit Court opinions which have held that judgment-creditors stand in the position of the debtor-defendants with respect to the insurance policy and are subject to any defenses the insurer may have against the insured-judgment-debtor for breach of the policy conditions. E.g., *Ocean Accident & Guarantee Corp. v. Lucas*, 74 F.2d 115 (6th Cir. 1934); *Royal Indemnity Co. v. Rexford*, 197 F.2d 83 (5th Cir. 1952). Thus, this decision conflicts with the decisions of other courts of appeals on the same matter, including the Fifth Circuit itself.

### B. LACK OF SUBJECT-MATTER DIVERSITY JURISDICTION RAISED FOR THE FIRST TIME ON APPEAL TO THE COURT OF APPEALS

1. By completely failing to render an opinion on Petitioner's motion to dismiss the cases of *Beverly Minnis v. American Home Assurance Co.* and *Judy Minnis v. American Home Assurance Co.* for lack of subject-matter jurisdiction, which was raised for the first time on appeal, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court could thus prevent the manifest injustice of requiring Petitioner to satisfy judgments rendered by a court which the Petitioner maintains did not have jurisdiction over the subject-matter in the first instance. Petitioner was denied the opportunity to question the Court's jurisdiction and receive an opinion thereon.

2. If it be assumed that the failure of the Court of Appeals to rule on the question of the District Court's jurisdiction did in fact exist, then such a ruling would be in direct conflict with the Law of the State of Georgia, as well as conflicting with a prior decision of the Fifth Circuit Court of Appeals on all fours, on the question of jurisdiction, with the present case and also arising out of and construing Georgia Law.

Under Georgia Law, a plaintiff's request for a new trial is, in effect, a new suit and service upon the defendant is again required. Georgia Code Annotated § 70-306. In the Georgia case of *Dunn v. Dunn*, 221 Ga. 368, 144 S.E.2d 758 (Sup. Ct. 1965), it was held that failure to personally serve defendant with notice of the motion for new trial left the State Court without jurisdiction to render a subsequent judgment. The subsequent judgment was, therefore, held to be void and subject to collateral attack at any time and at any place. The Georgia Supreme Court stated that "where there is no service or waiver thereof, the Court is without jurisdiction and its judgment is void, not merely voidable, and may be attacked in any Court where such judgment is attempted to be enforced." 144 S.E.2d at 760.

The case on all fours with the present case involved a collateral attack in the same Court of a judgment rendered in the same State Court and the Fifth Circuit Court of Appeals held that suit brought in the District Court required dismissal. *Mason v. Royal Indemnity Co.*, 123 F.2d 335 (5th Cir. 1941). In that case, Mason, the plaintiff, received a Six Hundred Fifty Dollars ($650.00) judgment against a John Harrison in the Superior Court of Fulton County, Georgia for personal injuries he sustained in an automobile accident. Since Mason felt the damages were inadequate, the judgment was set aside and a new trial granted without notice being properly served upon the defendant. The new trial resulted in a judgment of Three Thousand Seven Hundred Fifty Dollars ($3,750.00) in favor of Mason. Mason filed a suit in the Federal District Court for the Northern District of Georgia against Royal Indemnity Company for collection of the unsatisfied State Court judgment on the ground that Harrison was an additional insured under a liability policy, issued to Mason's wife by Royal Indemnity Company. The Fifth Circuit Court of Appeals held that the plaintiff's motion for a new trial because the damages were inadequate was, in effect, a new suit requiring personal service upon the defendant and failure to perform this rendered the latter judgment void

and required dismissal of this suit for the collection of unsatisfied void State Court judgments.

3. If the subsequent State Court judgments were void, then Beverly Minnis and Judy Minnis had valid judgments in the sum of Four Thousand Dollars ($4,000.00) and Three Thousand Dollars ($3,000.00), each being substantially below the Federal Diversity jurisdictional amount requirement of 28 U.S.C.A. § 1332. By allowing the District Court to entertain jurisdiction, the Court of Appeals has decided a Federal question in such a way so as to conflict with applicable decisions of this Court on the question of diversity jurisdiction and on the question of the ability to appeal. Furthermore, said decision is violative of a Federal statute and has allowed the Federal Court's jurisdiction to be improvidently invoked.

4. In the case of Beverly Minnis, even the subsequent State Court judgment of Seven Thousand Five Hundred Dollars ($7,500.00) is substantially below the jurisdictional amount requirement and the reasoning in paragraph 3 above is likewise applicable to this subsequent and allegedly void State Court judgment herein sued upon.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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## CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit on James H. Weeks, Esq., 2230 National Bank of Georgia Building, Atlanta, Georgia and A. R. Barksdale, Esq., Conyers, Georgia, this ___ day of _____, 1969.

ANTHONY J. SICILIANO

## APPENDIX

**28 U.S.C.A. § 1332 Diversity of citizenship; amount in controversy; costs**

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal Courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

**Rule 12(h), (3) of the Federal Rules of Civil Procedure**

Rule 12. "Defenses and Objections–When and How Presented–By Pleading or Motion–Motion for Judgment on the Pleadings."

(h) "Waiver or Preservation of Certain Defenses."

"(3) Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject-matter, the court shall dismiss the action. As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966."

GEORGIA CODE ANNOTATED § 68-612

68-612. "Bond; indemnity in lieu of bond; self-insurance.–No certificate shall be issued or continued in opera-

tion unless the holder thereof shall give and maintain bond, with adequate security, for the protection, in case of passenger vehicles, of the passengers and baggage carried, and of the public against injury proximately caused by the negligence of such motor common carrier, its servants or agents; and in cases of vehicles transporting freight, to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor common carrier may be legally liable; and for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or agents. The commission shall approve, determine and fix the amount of such bonds, and shall prescribe the provisions and limitations thereof, and such bonds shall be for the benefit of and subject to suit or action thereon by any person who shall sustain actionable injury or loss protected thereby. The commission may, in its discretion, allow the holder of such certificate to file, in lieu of such bond, a policy of indemnity insurance in some indemnity insurance company authorized to do business in the State of Georgia, which policy must substantially conform to all of the provisions hereof relating to bonds, and must likewise be approved by the commission. The commission shall have power to permit self-insurance in lieu of a bond or policy of indemnity insurance, whenever, in its opinion, the financial ability under this Chapter for any person having a cause of action arising hereunder in tort or contract to join in the same suit the motor carrier and its surety in the event a bond is given. If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract."

GEORGIA CODE ANNOTATED § 70-306

70-306. "Rules nisi, service. Entry of motion on minutes of court.—In all applications for a new trial the opposite party shall be served with a copy of the rule nisi, unless such copy is waived. The clerks of the superior

courts shall not be required, except by order of the presiding judge, to enter upon the minutes of said courts motions for a new trial in cases tried therein, but said motions shall be filed in office as other papers, and shall be recorded together with the other pleadings in said cases when the same are finally disposed of, as now required by law."

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

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No. 25737

---

AMERICAN HOME ASSURANCE COMPANY,
Appellant,

versus

HELEN N. SPICER, JUDY MINNIS,
BEVERLY MINNIS,
(AND REVERSE TITLE)
Appellees.

---

*Appeals from the United States District Court for the Northern District of Georgia*

---

(November 13, 1968)

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Before BROWN, Chief Judge, TUTTLE, Circuit Judge, and FISHER, District Judge.

PER CURIAM: We have carefully considered the record and briefs in this case, and conclude that the judgment of the district court reaches the correct conclusion by reasoning that is unassailable. We have also carefully considered the original opinion, supplemented by the opinion following appellant's motion for reconsideration in the court below, both written, as they were, by a distinguished District Judge for the Northern District of Georgia who had himself served for a number of years as a judge of the Superior Court of the state of Georgia. Being a diversity case as to which this court should pay substantial deference to the views of the trial court of the state involved, where juris-

prudence at the highest level of the state court is lacking, we consider that we can do nothing better with respect to our judgment that the case should be affirmed than to accept and adopt the opinion of the trial court, which we do. See ___ F. Supp. ___.

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption omitted in printing]

ON PETITION FOR REHEARING EN BANC
(December 17, 1968)

Before BROWN, Chief Judge, TUTTLE, Circuit Judge, and FISHER, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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United States Court of Appeals
FOR THE FIFTH CIRCUIT

[Caption omitted in printing]

Before BROWN, Chief Judge, TUTTLE, Circuit Judge, and FISHER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, American Home Assurance Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 13, 1968

Issued as Mandate: JAN 23 1969